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In The

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

versus

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Congress violated the separation of powers doctrine by legislatively overruling a Supreme Court determination of the scope of the Free Exercise Clause of the First Amendment.

2. Whether Congress violated the constitutional balance between its power under Section 5 of the Fourteenth Amendment and fundamental principles of federalism by commandeering state and local governments to be agents of a federal policy to accommodate religious exercise more than the Constitution requires.

3. Whether *Katzenbach v. Morgan*, 384 U.S. 641 (1966), should be overruled in part.

4. Whether Congress violated the Establishment Clause of the First Amendment by broadly and exclusively privileging religion over other expressions of conscience.

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JURISDICTION

The Fifth Circuit decision was reached on January 23, 1996; the petition for rehearing en banc, which was treated by the Fifth Circuit as a petition for rehearing, was denied on March 28, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb1-4 (1993), *reprinted in* Cert. Pet. App. at 39a-42a; U.S. Constitution, Article III, § 1, *reprinted in* Cert. Pet. App. at 35a; Amendment XIV, §§ 1, 5, *reprinted in* Cert. Pet. App. at 36a-38a; Amendment I, clauses 1, 2, *reprinted*

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[1] Pages in the Appendix to the Petition for Writ of Certiorari are cited as Cert. Pet. App. Pages in the Joint Appendix to the Petitioner's Brief on the Merits are cited as Jt. App.

in Cert. Pet. App. at 36a; Amendment X, *reprinted in* Cert. Pet. App. at 36a.

STATEMENT OF THE CASE

1. *Facts.* This case is about a request to tear down a beautiful stone church, whose times and memories are graven into the souls of a city. While the issue of the church's precise historical value is a matter that has been left to trial, Jt. App. at 72, the City maintains that St. Peter Church, which was built in 1923, is a striking example of mission revival architecture self-consciously referring back to the original Spanish missions in South Texas. As one arrives in the City of Boerne, Texas, this highly visible church set on a hill speaks directly of the history of this City and its people. Klein Affidavit, Jt. App. at 43. The people of the City seek to preserve their community's shared history as reflected in this familiar mission revival structure. *Id.*

With Ordinance 91-05, the City of Boerne enacted a historic preservation law intended to preserve and protect its rich history and culture. Recognizing that "rapid change in population, economic functions and land use activities" has threatened the distinctive historical character of its community, the City Council of Boerne passed its historic landmark preservation law for the following purposes:

> (1) "To protect, enhance, and perpetuate selected historic landmarks which represent or reflect distinctive and important elements of the city's and State's architectural, archeological, cultural, social, economic, ethnic and political history . . . . "

(2) "To safeguard the City's historic and cultural heritage . . . . "

(3) "To stabilize and improve property values in such locations."

(4) "To foster civic pride in the beauty and accomplishments of the past."

(5) "To protect and enhance the City's attractions to tourists and visitors and provide incidental support and stimulus to business and industry."

(6) "To strengthen the economy of the City."

(7) "To promote the use of historic landmarks for the culture, prosperity, education and general welfare of the people of the City and visitors to the City."

Cert. Pet. App. at 46a-48a.

Boerne's historic preservation law represents years of effort on the part of the City and evidences the citizens' commitment to their community's heritage. On May 20, 1985, the City Council duly enacted Ordinance No. 85-11, which authorized the creation of a Landmark Commission. Jt. App. at 66. The Landmark Commission was appointed on November 10, 1987, began to explore the creation of a historic district on February 16, 1988, and held numerous meetings to discuss the historic district boundaries. *Id.* Three public hearings were held in 1990 to discuss and determine the historic district boundaries. *Id.*

Ordinance 91-05, which was enacted into law on June 25, 1991, codifies the City's historical preservation policy goals; defines "historic landmark" and "historic district";

appoints and designates procedures for a "Historic Landmark Commission"; orders the Commission to prepare a landmark preservation plan; and designates procedures for the following: the acquisition and removal of historic landmark designation, the creation of historic districts, the evaluation of proposed exterior changes to structures within a historical district or a designated historic landmark, and the acquisition of a historic structure preservation tax exemption. Cert. Pet. App. at 46a-63a. Pursuant to Ordinance 91-05, the Historic Landmark Commission presented its recommendation for creation of the historic district to the Planning and Zoning Commission on October 1, 1991. Jt. App. at 67.

Respondent Flores was given notice of the December 3, 1991 hearing of the Planning and Zoning Commission and City Council for the creation of the historic district. Jt. App. at 69. Subsequently, Ordinance 91-15 added the historic overlay district to the City of Boerne zoning map on January 14, 1992. Jt. App. at 68. Ordinance 91-15 states that rapid changes in the local population, economy, and land use have led to the demolition of historical structures that "reflect the heritage of the state, and its people . . . so that the city, the state, and the nation are thereby losing a part of their heritage." Jt. App. at 24.

There is no dispute that the City's historic preservation ordinance covers at the least a substantial portion of the church. *Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996).

On December 14, 1993, a building permit application was submitted on behalf of Respondent Flores for the purpose of demolishing and expanding St. Peter Church. Jt. App. at 67. A public hearing was held by the Landmark Commission to consider the application. Upon its

determination that the proposed plan will adversely affect the historic district and is inappropriate or inconsistent with the spirit and purposes of Ordinance 91-05, the Landmark Commission advised the City Building Inspector, Mr. Ed Beasley, that the permit could not be approved until certain changes to the application were made. Jt. App. at 68-69. The letter stated that the Landmark Commission had employed the following criteria, which are taken from Sec. 6.1 of Ordinance 91-05, to determine that the application violated the ordinance:

1. Character, interest or value as part of the development, heritage or cultural characteristics of the City.

3. Embodiment of distinguishing characteristics of an architectural type or specimen.

5. Unique location of singular physical characteristics representing an established and familiar visual feature of a neighborhood, community or the City.

6. Value as an aspect of community sentiment or public pride.

The letter further stated: "Due to the structure's historical importance to the community and our charge of protecting and preserving certain structures, areas, etc., deemed historical, any new plans shall not include demolition of the existing structure referred to as St. Peter's Catholic Church." Jt. App. at 39a. The City Building Inspector sent a letter to Respondent's architect, Mr. Gregory Davis, confirming the denial of the permit by the Landmark Commission. Jt. App. at 60a.

Pursuant to Ordinance 91-05, Respondent Flores appealed the Landmark Commission's decision to the City Council. After notice and a public hearing, the City

Council voted to deny Respondent's appeal. Jt. App. at 69. Representatives of both parties have considered alternative site designs but have been unable to reach an agreement. Jt. App. at 70. Respondent Flores filed this suit, pursuant to 28 U.S.C. § 1331, alleging *inter alia* that Ordinance 91-05 violates the Religious Freedom Restoration Act ("RFRA" or "the Act"), 42 U.S.C. § 2000bb (1993).

2. *The District Court.* Following certification of the question of RFRA's constitutionality pursuant to 28 U.S.C. § 2403(a) to the Attorney General of the United States, intervention of the United States, and briefing on the constitutional issue by all parties, the district court ruled that RFRA was facially invalid because "Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA," *Flores v. City of Boerne*, 877 F. Supp. 355, 357 (W. D. Tex. 1995), and therefore infringed on the long-settled authority of the courts " 'to say what the law is.' " *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The court noted Congress's power under Section 5 of the Fourteenth Amendment, but did not find it a persuasive basis for congressional authority in light of "Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary." *Flores*, 877 F. Supp. at 357.

The district court certified its order for interlocutory appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b). Cert. Pet. App. at 29a. Respondent Flores and the United States appealed the district court's decision. The court of appeals accepted the appeal, treating it as a Fed. R. Civ. P. 54(b) partial final judgment. Jt. App. at 73.

3. *The Court of Appeals.* The court of appeals reversed on four grounds. First, the court held that Congress acted within its power under Section 5 of the Fourteenth Amendment on the theory that RFRA is remedial because it prohibits "budding or disguised constitutional violations," "sprouting constitutional violations," and "incipient constitutional violations." *Flores*, 73 F.3d at 1359-60. The court applied the three-part test found in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The Fifth Circuit found that RFRA "may be regarded" as an enactment to enforce the Fourteenth Amendment, which incorporates the First Amendment. In support of its conclusion that RFRA enforces the First Amendment's prohibitions against the states, the court cited legislative history regarding the "need for legislation to defend individuals, particularly those from minority religions, from generally applicable laws that burden the exercise of religion." *Flores*, 73 F.3d at 1359.

The court then stated that RFRA is "plainly adapted to [the end of the First Amendment.]" *Flores*, 73 F.3d at 1360. The court agreed with the United States' argument that "even if the Constitution only prohibits governmental action taken with the intent of interfering with religious exercise, Congress may go farther, as it did with RFRA, and prohibit conduct that has the effect of burdening the exercise of religion" on the ground that this Court had held in *City of Rome v. United States*, 446 U.S. 156, 177 (1980), that Congress may "prohibit laws with a racially

discriminatory effect . . . as an appropriate method of promoting the Amendment's purpose, even if the Constitution only prohibits laws with a racially discriminatory intent." *Flores*, 73 F.3d at 1360. Further, the court reasoned, RFRA could be justified as an attempt to protect religious minorities, and that Congress "could reasonably conclude" that minority religions would be at a disadvantage in obtaining religious exemptions. *Id.*

The Fifth Circuit ruled that the third prong of the *M'Culloch* test, whether RFRA is consistent "with the letter and spirit of the constitution," was satisfied because RFRA did not violate the separation of powers, the Establishment Clause, or the Tenth Amendment.

Second, the court addressed the City's separation of powers challenge to RFRA. The City had argued that RFRA violates the separation of powers by permitting Congress to legislate an interpretation of the Constitution at odds with the Supreme Court's interpretation. The City cited this Court's statement in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), that it is the duty of the judiciary "to say what the law is." Acknowledging that RFRA is a "direct response to the Supreme Court's decision in *Smith*," the court rejected the notion that RFRA "second-guess[es] the courts." *Flores*, 73 F.3d at 1361. Rather, the court characterized RFRA as a statute regulating "nascent violations" of the Free Exercise Clause, in the sense that it dispenses with the requirement that discriminatory purpose be shown in order to ferret out substantial burdens on the free exercise of religion. *Id.*

The court of appeals also reasoned that because governments *may* accommodate religion more than the Free Exercise Clause requires, Congress has the power to force all governments to accommodate all religious conduct

substantially burdened by a generally applicable law. It concluded: "In short, the judiciary's duty is to say what the law is, but that duty is not exclusive." *Id.* at 1363.

The court of appeals also termed as "facile" the United States' argument that RFRA is merely a statute that "provides legislative protection for a constitutional right over and above that provided by the Constitution." *Flores*, 73 F.3d at 1361. The court stated: "We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in *Smith*." *Id.* Nevertheless, the court upheld RFRA on the theory that Section 5 permits Congress "an extraordinary exercise of power." *Flores*, 73 F.3d at 1362.

Third, the court rejected the City's argument that RFRA violates the Establishment Clause by privileging religion on the ground that RFRA does not "amount to the Government coercing religious activity through 'its own activities and influence.' " *Flores*, 73 F.3d at 1364 (quoting *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987)).

Finally, the court held that RFRA "on its face" does not violate the Tenth Amendment, but left "RFRA's applicability to particular areas of state regulation . . . for individual, case-by-case resolution." *Id.*

The City of Boerne filed a timely Petition for Writ of Certiorari in this Court, and on October 15, 1996, the writ was granted.

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act requires governments to accommodate religious conduct unless they

can prove a "compelling interest" and that they have acted with the "least restrictive means." 42 U.S.C. § 2000bb-1, *reprinted in* Cert. Pet. App. at 40a. It was enacted for the purpose of supplanting this Court's interpretation of the Free Exercise Clause announced in *Employment Division v. Smith*, 494 U.S. 872 (1990), with an interpretation more palatable to Congress.

The word "Restoration" in the Act's title is a euphemism. In *Smith*, this Court announced that neutral, generally applicable laws are not subject to the compelling interest standard. *Smith*, 494 U.S. at 885. RFRA's across-the-board, extraordinarily high standard requires more than this Court's free exercise doctrine ever required, either in *Smith* or before *Smith*. This brazen attempt to take over free exercise law knows no parallel in congressional history and violates the separation of powers, federalism principles, and the Establishment Clause.

The courts' core judicial function is to resolve Article III cases or controversies by reading and interpreting the relevant constitutional text. Under the guise of creating a "statutory" cause of action to support a legislatively-preferred reading of the Free Exercise Clause, Congress has taken over the judicial function of interpreting the Constitution in the course of adjudicating cases and controversies.

RFRA is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. Under *The Civil Rights Cases*, 109 U.S. 3 (1883), Section 5 extends power to Congress solely to enforce constitutional guarantees. *Id.* at 11. The Act's invalidation of every law that incidentally burdens the free exercise of religion, whether the law targets a particular religion or not, creates extra-constitutional rights and therefore exceeds Congress's remedial power under Section 5.

This Court should lay to rest the "substantive power theory," i.e., the notion that Congress may expand the scope of constitutional guarantees, which was an alternative holding in the Voting Rights Act cases, and which transgresses separation of powers and federalism concerns.

The Act oversteps federalism boundaries inherent in Section 5 by forcing state and local governments to abide by a statutory scheme that is not required by the Constitution.

RFRA violates the Establishment Clause by privileging religion over all other forms of conscience. It fails this Court's test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). It does not have a secular purpose. It is certainly not neutral in effect. It requires entanglement of church and state by requiring all governments to become intimately informed on the theological tenets of every religion in the relevant community in order to be able to enact a law that is the least restrictive means.

ARGUMENT

The Religious Freedom Restoration Act mocks the genius of the American Constitution's structure. "From the standpoint of the . . . constitutional structure of this Nation, [the Religious Freedom Restoration Act] bring[s] us to a crossroad that is marked with a formidable 'Stop' sign. That sign compels us to pause before we [are carried] to the point of sanctioning Congress' " attempt to expand the scope of constitutional rights "by simple legislation." *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part).

The success of the Constitution resides in the Framers' fundamental insight that a division of duties,

authority, and power is essential to avoiding the concentrations of power that irresistibly lead to tyranny. In James Madison's words, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Acutely conscious of the history of tyranny in other countries and times, the Framers crafted a series of mechanisms intended to prevent the consolidation of too much power in any one institution. They separated the powers of the federal government into three branches, divided power between the federal and the state governments, and prohibited the union of church and state. With RFRA, Congress has disabled all three mechanisms, simultaneously transgressing three different constitutional boundaries.

I. THE RELIGIOUS FREEDOM RESTORATION ACT VIOLATES THE SEPARATION OF POWERS

The Religious Freedom Restoration Act is an undisguised attempt by Congress to overtake this Court's core constitutional function and to reverse this Court's statement of the meaning of the First Amendment's Free Exercise Clause in *Smith*, 494 U.S. 872 (1990). *See, e.g., The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 8, 9, 38, 41, 48 (1990). It rejects the Court's announced standard, which does not apply the Free Exercise Clause to general and otherwise valid neutral laws that incidentally burden religious conduct, and replaces it with one more pleasing to Congress. *See* 42 U.S.C. § 2000bb(a)(4), Cert. Pet. App. at 39a (criticizing *Smith* standard); *id.* at

§§ 2000bb(b)(1), 2000bb-1(a)-(c), Cert. Pet. App. at 40a (instituting compelling interest and least restrictive means tests whenever religious conduct is substantially burdened). "RFRA's rewrite of the Free Exercise Clause . . . is but the vehicle by which Congress seeks to ride into the judicial reservation." Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 111 (1996).

A. Separation of Powers Principles

Long settled constitutional doctrine holds that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); U.S. Const. art. III, §§ 1, 2. The Supreme Court, and only the Supreme Court, is the "ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962). The Supreme Court's core constitutional function is to decide the meaning of the Constitution in the context of deciding Article III cases and controversies.

Where Congress or the President tries to overtake this core judicial function, it violates the separation of powers. "[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996) (citing *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)). The judicial branch has been characterized as the "least dangerous branch." *See* Alexander M. Bickel, *The Least Dangerous Branch* (1962). Where its distinctive power to set constitutional standards of review has been usurped, it is the most *irrelevant* branch. In the words of Alexander Hamilton:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution

> is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also United States v. Nixon*, 418 U.S. 683, 703 (1974); *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1463 (1995) ("[T]he doctrine of separation of powers is a *structural safeguard.*"). The eminent constitutional scholar Thomas Cooley articulated the separation of powers problem embedded in RFRA in precise terms: the legislature "cannot compel the courts . . . to adopt a particular construction of a law [and] cannot . . . requir[e] of them a construction of the law according to its own views." Thomas Cooley, *Constitutional Limitations* 94-95 (1868), cited with approval in *Plaut*, 115 S. Ct. at 1455-56.

"Congress simply lacks the constitutional authority to override the Court's interpretation of the First Amendment." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994). After this Court declared the meaning of the Free Exercise Clause in *Smith*, Congress had no latitude to introduce a competing standard and then to direct the courts to implement that standard in cases adjudicating free exercise interests.

With RFRA, Congress has overstepped the bounds of its legitimate constitutional powers and made real the

"fear of legislative usurpation" that animated the Framers' pivotal decision to institute a government of limited powers. Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 32 (1983). In the end, this case is not about religious liberty, but rather about the power of Congress to alter the Constitution's liberty-preserving structure.

Fortunately, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992).

B. The Supreme Court's Free Exercise Doctrine

In 1990, this Court took the occasion of its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), to survey First Amendment Free Exercise doctrine. Reaffirming the approach that this Court has employed since its first free exercise decision, *Reynolds v. United States*, 98 U.S. 145 (1879), this Court explained that the compelling interest standard announced eighty-five years after *Reynolds* in *Sherbert v. Verner*, 374 U.S. 398 (1963), had been applied rarely in free exercise cases involving neutral, nondiscriminatory, generally applicable laws. *Smith*, 494 U.S. at 883-85. Justice Scalia, writing for the Court and joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, surveyed the doctrine as follows:

> We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to

> apply the *Sherbert* test in contexts other than that, we have always found the test satisfied. In recent years we have abstained from applying the *Sherbert* test. . . . In *Bowen v. Roy*, 476 U.S. 693 (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. . . . In *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes . . . In *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 89 L.Ed.2d 478 (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), we sustained without mentioning the *Sherbert* test, a prison's refusal to excuse inmates from work requirements to attend worship services.

Smith, 494 U.S. at 883-84 (citations omitted).

Even those in dissent in *Smith* agreed that the compelling interest test had not obtained in every context. Justices Brennan, Marshall and Blackmun joined the section of Justice O'Connor's concurrence in the judgment in which she identified "contexts in which [the Court has] not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest." *Id.* at 900-01 (identifying cases involving the government's conduct of its own internal affairs, military

regulations and prison regulations as subject to deferential review).[2]

The Court continued: "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. . . . We conclude today that the sounder approach, and *the approach in accord with the vast majority of our precedents*, is to hold the [*Sherbert*] test inapplicable to . . . [free exercise] challenges [to generally applicable laws]." *Id.* at 885-86 (emphasis added). In other words, the compelling interest test was inconsistent with most of the Court's free exercise precedents.

The *Smith* Court limited its discussion to the compelling interest test announced in *Sherbert*, not even referring to the least restrictive means test that appears in § 2000bb-1(b) of RFRA. In fact, the least restrictive means test has not been a staple of free exercise doctrine. It has never been used by this Court to invalidate a law and has been cited as a component of the standard of review for free exercise cases in only one case, *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981).

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[2] Justice O'Connor elaborated on the context-dependent nature of First Amendment jurisprudence in *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 114 S. Ct. 2481, 2498-99 (1994), stating:

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that might arise under a particular [First Amendment] clause . . . . But the same constitutional principle may operate very differently in different contexts.

In a similar vein, Justice Breyer, joined by Justices O'Connor, Souter, and Stevens, has criticized the "straightjacket" of rigid formulae in the First Amendment arena. *See Denver Area Educ. Telecomm. Consortium, Inv. v. FCC*, 116 S. Ct. 2374, 2385 (1996).

See also The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 380-81 (1992) (statement of Professor Ira C. Lupu) ("You will search the Supreme Court's opinions in *Yoder* and *Sherbert* in vain for the [least restrictive means test].").

The *Smith* Court explained its decision to follow the larger trend of its precedents rather than to extend the compelling interest test beyond the few cases employing it, saying:

> Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, 366 U.S., at 606, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

Smith, 494 U.S. at 888.

Five months before RFRA was enacted, the Court reaffirmed its commitment to its free exercise doctrine announced in *Smith* with its decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). The opinion for the Court, written by Justice Kennedy and joined by Chief Justice Rehnquist and Justices Stevens, White, Scalia, and Thomas, declared: "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition

that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. Although challenged to retreat from the *Smith* Court's analysis by separate opinions authored by Justices Blackmun, *id.* at 577 (Blackmun, J., concurring in the judgment), and Souter, *id.* at 559 (Souter, J., concurring in part and concurring in the judgment), this Court adhered to the *Smith* analysis of free exercise doctrine. Congress ignored this manifest reaffirmation of the Court's free exercise doctrine and enacted RFRA only months later.

C. Congress's Hostile Response to *Employment Division v. Smith*

The plain language of RFRA, as well as its legislative history, make painfully clear that members of Congress read the Court's thoughtful opinion in *Smith* with attention and therefore understood that the Court had declared that the First Amendment's free exercise doctrine does not require strict scrutiny of neutral, nondiscriminatory, generally applicable regulations.[3] *Smith*, 494 U.S. at 888. Not satisfied with the Court's statement of the Free Exercise Clause, Congress, at the insistence of organized religions and civil liberties groups from around the country, drafted and enacted RFRA for the sole purpose of overturning *Smith*.[4]

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[3] The *Smith* decision was the singular focus of the hearings held in support of RFRA. RFRA's legislative history contains no less than 405 pages explicitly referencing *Smith*.

[4] *The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of*

Any hopes that the Executive Branch's veto power might have been exercised to halt this march into the judiciary's terrain were dashed when President Clinton signed RFRA into law, saying RFRA "reverses the Supreme Court's decision [in] Employment Division against Smith." Remarks on Signing the Religious Freedom Restoration Act of 1993, II Pub. Papers 2000 (Nov. 16, 1993).

The Religious Freedom Restoration Act is nothing less than a competing interpretation of the Free Exercise Clause. In the Free Exercise context, it turns day to night. It transforms presumptively valid neutral, nondiscriminatory, and generally applicable laws into "presumptively invalid" laws. *Smith*, 494 U.S. at 888.

RFRA bears the hallmarks of a constitutional decision overruling a prior judicial precedent. The text of the Act is not in the least shy about declaring its constitutional character. The Act begins with the following declaration: "[T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." 42 U.S.C. § 2000bb(a)(1), Cert. Pet. App. at 39a. The Act goes so far as to define "exercise of religion" for purposes of the Act as "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4), Cert. Pet. App. at 41a.

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the House Comm. on the Judiciary, 101st Cong., 2d Sess. 2, 8, 9, 11, 22, 28-29, 31-32, 35, 38, 41, 48, 49, 51, 61 (1990); *The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 7, 8, 19, 23, 32, 39, 45, 63, 99, 136, 160, 175, 193, 201, 214, 249, 251, 271 (1992).

The Act's scope is constitutional in nature, its sweep breathtaking. RFRA applies to every government and every law in the United States, past, present and future:

Every government. The Act defines "government" as including "a branch, department, agency, instrumentality, and official (or person acting under color of law) of the United States, a State, or a subdivision of a State." 42 U.S.C. § 2000bb-2(1), Cert. Pet. App. at 41a.

Every law. The Act states that RFRA "applies to all Federal and State laws, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a), Cert. Pet. App. at 41a. The range of *amici* in support of Petitioner evidences the way in which RFRA invades every arena of government regulation: from the protection of children to historical preservation and urban planning to prison oversight. These in turn reflect only a small portion of the universe affected by RFRA.

Every time. The Act expressly applies to every law that was "adopted before or after November 16, 1993 [the date of RFRA's enactment]." 42 U.S.C. § 2000bb-3(b), Cert. Pet. App. at 41a.

In direct and unmistakable contravention of *Smith*, Congress enacted into law the compelling interest test announced in *Sherbert*, stating, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless the law] is in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(a), *reprinted in* Cert. Pet. App. at 40a.

Congress also codified in RFRA a least restrictive means test, despite its insignificant role in free exercise cases. *See* 42 U.S.C. § 2000bb-1(b), *reprinted in* Cert. Pet. App. at 40a. In short, RFRA mandates a standard – the

compelling interest test – that the Supreme Court expressly stated was not the traditional or the appropriate standard in free exercise cases, *Smith*, 494 U.S. at 884-85, and appends to it a test so infrequently invoked that the *Smith* Court found it unnecessary to address.

RFRA's new standard marks a sea change from prior free exercise law. The least restrictive means test by itself transforms *Smith*'s presumption of validity for neutral, generally applicable laws into a standard that "will ultimately lead to striking down almost any statute on the ground that the Court could think of another 'less restrictive' way to write it." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 294-95 (1985) (Rehnquist, J., dissenting).

Predictably and ironically, in Congress's headlong rush to "fix" free exercise law, Congress drafted a new free exercise standard. As the preceding description of the Court's doctrine should make clear, the euphemistically-named Religious Freedom Restoration Act does not restore the free exercise doctrine in place before *Smith* but rather creates out of whole cloth a new free exercise standard characterized by a rigid, across-the-board standard not in evidence in the "vast majority" of the Court's Free Exercise decisions before *Smith* was decided. *Smith*, 494 U.S at 882-87; *see also id.* at 900-01 (O'Connor, J., concurring). Indeed, the most oppressive aspect of RFRA for governments – the least restrictive means test – is a virtual novelty in the free exercise arena. *See supra* part I.B. If what members of Congress intended to do was to restore prior law, they bungled the job rather seriously.

Congress has co-opted the Court's interpretive role. As a direct result, the courts have been relegated in free

exercise cases to the role of interpreting Congress's inaccurate assessment of the Constitution, rather than their constitutionally appointed role of interpreting the Constitution itself.

RFRA's defenders have attempted to gloss over its glaring separation of powers faults by stating that it is merely a "statutory" right over and above a constitutional floor set by the Court. The characterization of RFRA as a "mere statutory right," however, is nothing more than a thin pretext for Congress's attempt to overtake the Court's appointed role in interpreting the Free Exercise Clause of the First Amendment. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) ("[T]he judicial department . . . will decide whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government."). The lower courts have had little patience with this misleading defense of RFRA. See *Flores*, 73 F.3d at 1361; *Hamilton v. Schriro*, 74 F.3d 1545, 1563 (8th Cir. 1996) (McMillian, J., dissenting); *Hodge v. Magic Valley Evangelical Free Church, Inc.*, 200 B.R. 884, 900-01 (Bankr. D. Idaho 1996); *Keeler v. Mayor & City Council of Cumberland*, 928 F. Supp. 591, 599 (D. Md. 1996).

D. RFRA Must Be Struck to Preserve the Balance of Power Between the Court and Congress

The Supreme Court bears responsibility to delineate the constitutional scope of congressional power to legislate. *See United States v. Lopez*, 115 S. Ct. 1624, 1639-40 (1995) (Kennedy, J., concurring); *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995). As then-Justice Rehnquist has stated,

> While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities.

City of Rome, 446 U.S. at 207 (Rehnquist, J., dissenting). RFRA's transgression of judicial power overcomes this presumption of constitutionality. "To allow a simple majority of Congress to have final say on matters of constitutional interpretation is . . . fundamentally out of keeping with the constitutional structure." *Mitchell*, 400 U.S. at 205 (Harlan, J., concurring in part and dissenting in part).

> In essence, Congress has instructed the Supreme Court how to interpret the Free Exercise Clause of the First Amendment (that is, apply the compelling interest test), even though the Court, the entity charged by the Constitution with its application, has determined that the compelling interest test is neither feasible nor required. It hardly needs to be said that where Congress and the Supreme Court are so clearly at odds with each other over the definition of a fundamental right, the conflict presents an obvious and serious threat to the delicate balance of the separation of power.

Hamilton, 74 F.3d at 1566 (McMillian, J., dissenting).

There is nothing ambiguous about RFRA's separation of powers violation. This Court's statement of the free exercise standard in *Smith* was stated in plain terms. And Congress's act of overriding that standard is unmistakable in the title, the plain language of the Act, and in its

legislative history.[5] Never before has the Court's constitutional preserve of power been compromised to this extent. RFRA is nothing short of a hostile takeover of this Court's constitutionally appointed role in free exercise cases.

Without a doubt, religious liberty is at the heart of this country's experiment with democracy. This Court stated in *Smith* that governments could and would accommodate religion with specific exemptions from generally applicable laws. *See Smith*, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."). But the power of accommodation does not make any and every congressional foray into the free exercise preserve safe from constitutional error. However Congress may act to protect religious liberty, it must not be permitted to enter this deeply important arena by undermining the courts' authority to interpret the Constitution.

To restore the balance of power between Congress and the Court intended by the Framers to ensure liberty,

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[5] As Congressman Henry J. Hyde pointed out during its enactment, RFRA's very title betrays its constitutional violation: "Congress writes laws – it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to 'restore' a prior interpretation of the First Amendment." H.R. Rep. No. 88, 103d Cong., 1st Sess. 15 n.3 (1993).

the Religious Freedom Restoration Act must be struck down.[6]

II. THE RELIGIOUS FREEDOM RESTORATION ACT IS NOT A LEGITIMATE EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. "This article," is the Fourteenth Amendment, which provides a set of constitutional guarantees against the states. By the plain language of Section 5, Congress may enforce only constitutional guarantees contemplated by the Fourteenth Amendment.[7] There is not

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[6] To state the matter from a different perspective, although one just as grounded in the fundamental structure of the Constitution, if RFRA is constitutional, then Congress can amend the Constitution without the cumbersome, but extraordinarily important ratification procedures dictated by Article 5 of the United States Constitution. Not only has Congress stepped into the Court's preserve, it has also overtaken the people's authority, exercised through state conventions, to ratify constitutional amendments. *See also Mitchell*, 400 U.S. at 152 (Harlan, J., concurring in part and dissenting in part).

[7] The plain language of Section 5 also makes clear that it only provides Congress power to regulate state law. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 605-06 (1990) (O'Connor, J., dissenting):

> Section 5 empowers Congress to act respecting *the States*, and of course this case concerns only the administration of federal programs by federal officials. Section 5 provides to Congress the "power to

the least intimation that Congress has the power to enforce its policy predilections beyond constitutional guarantees. *See City of Rome*, 446 U.S. at 206 (Rehnquist, J., dissenting); *Mitchell*, 400 U.S. at 152 (Harlan, J., concurring in part and dissenting in part). Congress's attempt with RFRA to force state and local governments to accommodate religious conduct more than this Court has said the Constitution requires runs headlong over a dangerous precipice.[8] A decision to uphold RFRA would

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enforce, by appropriate legislation, the provisions of this article," which in part provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

In fact, RFRA's legislative history is silent on the enumerated power that justified its regulation of the free exercise standard of review against federal law, making it difficult for the Court to assess that question in a case that raises the issue. *See Lopez*, 115 S. Ct. at 1631-32.

[8] If section 5 permits Congress to enact RFRA and to force state and local governments to dance to Congress's policy tune, then the Congress may now turn to enacting the "Ultimate Free Speech Act," which would require all governments to justify laws affecting speech by demonstrating a compelling interest and proving their duly enacted laws were the least restrictive means. Such a law would overturn, at a minimum, this Court's decisions regarding sexually explicit speech that have been sensitive to local control over such materials and would force local governments to accommodate pornography much more than the Court has declared the Constitution requires. *See, e.g., City of Dallas v. Stanglin*, 490 U.S. 19 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *New York v. Ferber*, 458 U.S. 747 (1982); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). The Court's legitimate role in carefully drawing the all-important lines between First Amendment interests and the community's power to govern itself disappears if Congress can do what it has done in RFRA.

overrule *The Civil Rights Cases*, 109 U.S. 3, 11 (1883), which were decided in the same era as the passage of the Fourteenth Amendment, and in which the Court stated that Section 5 "invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition [found in the Fourteenth Amendment] . . . "

The Religious Freedom Restoration Act "does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed." *The Civil Rights Cases*, 109 U.S. at 11. Indeed, the Act makes no pretense to enforce only the constitutional guarantees against specifically targeted legislation recognized as unconstitutional in *Smith* and redressed in *Lukumi*. *Smith*, 494 U.S. at 872; *Lukumi*, 508 U.S. at 520. Rather, the Act was intended to prohibit all substantial burdens on "a person's exercise of religion even if the burden results from a rule of general applicability . . . . " 42 U.S.C. § 2000bb-1(a), Cert. Pet. App. at 40a. *See also* 42 U.S.C. § 2000bb(a)(4), Cert. Pet. App. at 39a (stating that *Smith* "eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . . "); H.R. Rep. No. 88, 103d Cong., 1st Sess. 1239 (1993) ("[T]he test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion."). The purpose of the Act is to supplant *Smith*, not to reinforce it. Thus, RFRA directs courts to enforce wholly extra-constitutional "rights," moving it well beyond the preserve of Section 5 power.

A. RFRA Is Unlike Any Other Statute

The various Section 5 arguments of RFRA's defenders boil down to one claim: the Court has upheld similar statutes before. That is, emphatically, untrue for two reasons.

First, and without a doubt, the Religious Freedom Restoration Act is in a class by itself. This is the first time Congress has attempted to preempt this Court's declared standard of review. Never before has Congress attempted to take the reins from the Court over a clause of the First Amendment, or, for that matter, over any clause of the Constitution.

The only congressional action that bears a surface resemblance to RFRA's blatant attempt to trump this Court's constitutional determination is the Human Life Bill, which was intended to overrule *Roe v. Wade*, 410 U.S. 113 (1973). *See* The Human Life Bill, S. 158, 97th Cong., 1st Sess. (1981). That bill faltered in part because of concerns raised about the constitutionality of Congress overruling a decision by the Supreme Court. Senator Orrin Hatch, one of its primary sponsors, refused to vote in favor of the Bill on the grounds that it overturned this Court's decision in *Roe v. Wade*, and therefore exceeded congressional authority under Section 5 of the Fourteenth Amendment. *Staff of Subcomm. on Separation of Powers of Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., Report on Human Life Bill, S. 158, together with additional and minority views 35 (Comm. Print 1981). RFRA, with its broad sweep, strays into the judiciary's terrain even more than the Human Life Bill, which affected only one issue – abortion – within the Court's privacy doctrine. RFRA stands by itself.

Second, the cases on which RFRA's defenders rely simply do not hold that Congress may reverse a Supreme Court decision by altering the standard of review in any, let alone all, cases.

B. RFRA Is Inconsistent With the Enumerated Power Requirement Announced in *M'Culloch v. Maryland*

The test for determining whether a statute is consistent with the enumerated power requirement was announced by this Court in *M'Culloch*, 17 U.S. (4 Wheat.) at 421:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

See also Ex Parte Virginia, 100 U.S. (10 Otto) 339 (1879). The Religious Freedom Restoration Act fails all three prongs of the *M'Culloch* test applied by the Fifth Circuit.

1. The Religious Freedom Restoration Act Is Not Within the Scope of the Constitution

The Fifth Circuit erred in its holding that RFRA enforces guarantees to be found in the Fourteenth Amendment. The court of appeals' error lies in its failure to grasp this Court's free exercise doctrine. The court of appeals employs RFRA as its benchmark for constitutional protection, assuming that all substantial burdens

on the exercise of religion automatically trigger constitutional protection. *Flores*, 73 F.3d at 1355. That view, however, is plainly rejected by this Court in *Smith* and *Lukumi*. *See Smith*, 494 U.S. at 881; *Lukumi*, 508 U.S. at 531. Neutral, generally applicable laws that incidentally burden religious exercise do not trigger close judicial review in free exercise cases. As Justice Scalia stated in his concurrence in *Lukumi*:

> The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law . . . prohibiting the free exercise" of religion within the meaning of the First Amendment.

508 U.S. at 557 (Scalia, J., concurring in part and concurring in the judgment).

The guarantee against all substantial burdens on religious exercise is located in a congressional enactment, RFRA, not a constitutional source. As such, RFRA is not "within the scope of the constitution." *M'Culloch*, 17 U.S. (4 Wheat) at 421.

2. The Religious Freedom Restoration Act Is Not Plainly Adapted to Achieve Constitutional Ends

Nor is RFRA "plainly adapted to" constitutional ends. As the preceding discussion makes clear, RFRA is

designed to *fill in* a perceived gap in free exercise protection left open by *Smith*, not to enforce rights guaranteed by the Constitution. The Fifth Circuit found this prong satisfied on the basis of this Court's decisions in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980), holding that Congress properly exercised its remedial power under Section 5 when it enacted RFRA. *Flores*, 73 F.3d at 1356-57. The remedial power found in these cases, however, does not justify RFRA.

Defenders of RFRA have also posited that RFRA is "plainly adapted to" constitutional ends because Section 5 gives Congress the power to expand the substantive scope of constitutional guarantees. This is the substantive power theory. The following discussion of Congress's Section 5 power will first address the remedial power theory and then the substantive power theory.

a. *The Remedial Power Theory*. Congress offered no basis for the exercise of its power in RFRA other than Section 5, specifically citing the Voting Rights Act cases.[9] Section 5 gives Congress the power to "enforce" or remedy, constitutional guarantees secured by the Fourteenth Amendment. Congress missed the mark. The Voting Rights Act cases simply do not stand for the proposition that Congress may "remedy" potential constitutional violations by altering the standard of review in all cases raising a particular constitutional issue.

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[9] *See The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm.*, 101st Cong., 2d Sess. 73-75 (1990) (letter of Professor Laycock).

i. *The Voting Rights Act Cases Do Not Support RFRA.* The Voting Rights Act cases read Section 5's remedial power to permit Congress, when employing the Supreme Court's previously announced standard, and on the basis of its superior factfinding capacity, to reach a conclusion under that standard at odds with Supreme Court determinations *under the same standard*. Under the Court's broadest reading of the remedial power, Congress has been permitted to enact prophylactic legislation that bans actions not forbidden by the Constitution for the purpose of enforcing constitutional guarantees. RFRA treats that prophylactic power as a warrant to enforce ends not guaranteed by the Constitution and therefore exceeds Section 5. *The Civil Rights Cases*, 109 U.S. at 19.

This Court's decision in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), involved Section 4(e) of the Voting Rights Act of 1965, which provides that persons who have received a primary education in Puerto Rico cannot be denied the right to vote. *Id.* The federal law was in direct conflict with New York's law requiring English literacy as a condition to vote, a law that was presumably not unconstitutional "on its face" under *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 54 (1959). Section 4(e) was challenged by New York State as beyond Congress's Section 5 power and in derogation of the Tenth Amendment. This Court upheld Section 4(e) as an exercise of Congress's power to remedy Equal Protection violations, stating that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to *secure the guarantees of the Fourteenth Amendment*." *Morgan*, 384 U.S. at 651 (emphasis added). *See also id.* at 652 (quoting Section 4(e) purpose "to secure the rights under the fourteenth amendment"). This Court left to Congress

the power "to assess and weigh the various conflicting considerations," in determining whether constitutional guarantees were being infringed. *Id.* at 653.

The Court in *Morgan* did not hand Congress carte blanche to overrule Supreme Court declarations of the appropriate standard of review in constitutional cases. Rather it stated that its decision in *Lassiter* was "inapposite," *Morgan*, 384 U.S. at 649, when Congress is engaging its factfinding capacities to protect Equal Protection guarantees. RFRA, of course, protects extra-constitutional interests and therefore exceeds congressional authority. *The Civil Rights Cases*, 109 U.S. at 11.

In *City of Rome*, in addressing the reach of Congress's power under Section 2 of the Fifteenth Amendment, the Court held, as in *Morgan*, that Congress could reach a factual conclusion at odds with a prior Supreme Court case. This Court upheld the Voting Rights Act's ban on electoral changes discriminating in effect, even though Section 1 of the Amendment only prohibited intentional discrimination. *City of Rome*, 446 U.S. at 177. Congress rationally concluded that there existed significant risk of purposeful discrimination that justified the enactment of a marginally overbroad remedy. *Id.* at 173-78. Once again, in the context of a detailed statute addressing the specifics of voting practices, the Court expressed its willingness to permit Congress to cure a particular constitutional evil with means deduced from a factual record indicating a link between the congressional remedy and a constitutional guarantee. *Id.* at 179. RFRA bears no corresponding correlation. It is hardly a detailed plan to cure a particular constitutional evil; it is based on the thinnest of factfinding records, especially when compared to its broad sweep; and it is aimed plainly at extra-constitutional evils.

Neither *Morgan* nor *City of Rome* provides precedent that supports the extraordinary exercise of power found in RFRA.[10] Even in the Court's most expansive Section 5 cases, the remedial power has been limited to the exercise of superior factfinding skills in the context of applying the Court's designated standard for constitutional violations. This Section 5 doctrine in no way creates a haven for RFRA's bald rejection of the Court's interpretation of the Free Exercise Clause of the First Amendment in all cases.

ii. *Congress Made No Factfindings in Passing RFRA That Would Support Its Extreme Overenforcement of Religious Interests.* Apparently, even Congress did not believe RFRA could be justified as an exercise of Congress's remedial power. Despite being urged by Professor Laycock to do so, *see Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives*, 102d Cong., 2d Sess. 357-58, 398 (1992), Congress engaged in no meaningful factfinding that would support the need for a congressional remedy in the free exercise arena. Indeed, Congress's express "Findings" in the Act speak to its dissatisfaction with *Smith*, not the state of religious liberty in the United States. 42 U.S.C. § 2000bb, Cert. Pet. App. at 39a.

Congress simply did not ask what effect RFRA would have on the thousands, if not millions, of regulations that would be affected by RFRA, for example, regulations

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[10] Nor do *Runyon v. McCrary*, 427 U.S. 160 (1976), *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), or *James Everard's Breweries v. Day*, 265 U.S. 545 (1924), which were decided under the Thirteenth and Eighteenth Amendments, respectively, not the Fourteenth Amendment.

governing emergency medical care of children in imminent danger of dying or sustaining permanent disability, childhood immunization requirements, child support payments, state-mandated autopsies, school safety laws governing the carrying of dangerous weapons, bankruptcy proceedings involving churches, the removal of Native American remains from church grounds, and every aspect of land use law. *See, e.g., Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (holding that Sikh schoolchildren must be permitted to carry knives in violation of school rule against the carrying of dangerous weapons).

"The enactment of RFRA can in no sense be said to involve the 'specially informed legislative competence' of Congress." *Keeler v. Mayor & City of Council of Cumberland*, 928 F. Supp. 591, 603 (D. Md. 1996). In fact, "Congress abdicated its responsibility to investigate the particular state action which might have the potential of unconstitutionally burdening the free exercise of religion . . . . " *Hamilton*, 74 F.3d at 1567 (McMillian, J., dissenting).

Under the prophylactic theory of *Morgan*'s first rationale, this Court has not upheld congressional action that overenforces constitutional guarantees against the states in the absence of a history of the states' unwillingness to comply with the constitutional standard. What "Congress has done through RFRA's passage under the banner of § 5 is dramatically different from its exercise of § 5 power in *Morgan* or in any other case to date." *Hamilton*, 74 F.3d at 1568 (McMillian, J., dissenting). Unlike the Voting Rights Act, the Religious Freedom Restoration Act was not necessitated by a refusal by state and local governments to abide by the Constitution, thereby requiring prophylactic legislation. *See Sasnett v. Sullivan*, 91 F.3d 1018,

1021 (7th Cir. 1996) ("We are given some pause . . . by the lack of a recent history of governmental discrimination against religious observance. . . . [I]t is not easy to take entirely seriously the proposition that the enactment of RFRA was necessary in order to prevent the states from engaging in forms of intentional discrimination that, unlike the ordinance invalidated in *Church of the Lukumi Babalu Aye*, could not readily be shown to be intentional."). The thin record supporting RFRA is in sharp contrast to this Court's description of the record on which the Voting Rights Act was based:

> Two points emerge vividly from the voluminous legislative history of the [Voting Rights] Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966). *See also Shaw v. Reno*, 509 U.S. 630, 640 (1993); *City of Rome*, 446 U.S. at 182; *Gaston County, N.C. v. United States*, 395 U.S. 285, 291 (1969). The RFRA legislative history is replete with denigrations of *Smith* but only sporadically dotted with a limited number of anecdotal reports of religious suppression. This Act invites this Court to charge Congress with the responsibility of building a record in overenforcement cases which would clarify, "streamline – and sharpen – the judicial task of reviewing federal legislation" under Section 5. Harold J. Krent,

Turning Congress Into an Agency: The Propriety of Requiring Legislative Findings, 46 Case W. Res. L. Rev. 731, 737 n.20 (1996).

In conclusion, RFRA is not a constitutionally legitimate prophylactic measure; rather, it is an unjustified and abusive exercise of Congress's remedial power under Section 5. *See Hamilton*, 74 F.3d at 1570 (McMillian, J., dissenting) ("This is not prophylaxis but unconstitutional interbranch hegemony.").

b. *The Substantive Power Theory.* To be completely fair to those who passed RFRA in reliance on *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and to those who continue to defend RFRA under *Morgan*, language in that decision implies a congressional power to expand the scope of constitutional guarantees:

> [Section] 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

Morgan, 384 U.S. at 651 n.10. This overreading of *Morgan* has been pervasive in the legal academy, and has misled the lower courts into upholding RFRA. *See, e.g., Belgard v. State of Hawai'i*, 883 F. Supp. 510, 513 (D. Haw. 1995).

Yet, the substantive power theory has never been the dispositive basis for a decision by this Court. Even in *Morgan*, it was only an alternative ground for decision. *Morgan*, 384 U.S. at 652-53 (justifying statute as exercise of remedial power under Section 5). *See also* Daniel O.

Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39, 51-52 (1995). As then-Justice Rehnquist has pointed out, five members of this Court rejected the substantive power theory in the later-decided case of *Oregon v. Mitchell*, 400 U.S. 112 (1970), *see City of Rome*, 446 U.S. at 220-21 (Rehnquist, J., dissenting), while only four members were in favor of the theory. *Mitchell*, 400 U.S. at 239-81 (Brennan, J., dissenting); *id.* at 135-44 (Douglas, J., dissenting). *See also EEOC v. Wyoming*, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting) ("I have always read *Oregon v. Mitchell* as finally imposing a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's 'role of final arbiter' . . . ").

This Court has in fact rejected the substantive power theory in the context of the Fifteenth Amendment, the enforcement language of which is almost identical to Section 5. Congress has been found to have exceeded its Fifteenth Amendment enforcement powers when "Congress has attacked evils not comprehended by the Fifteenth Amendment." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (citing *United States v. Reese*, 92 U.S. (2 Otto) 214, 217-18 (1875); *James v. Bowman*, 190 U.S. 127, 138 (1903)).

The substantive power theory hands Congress a power at odds with the separation of powers, and it permits Congress to yoke the states to its policy predilections in violation of the federalism constraints inherent in Section 5. The great Justice Harlan dissented in *Morgan*, because he believed that Congress must not be permitted to re-define the scope of constitutional guarantees. Legislation like the Religious Freedom Restoration Act can only be "sustained . . . at the sacrifice of fundamentals in

the American constitutional system – the separation between the legislative and judicial function and the boundaries between federal and state political authority." *Morgan*, 384 U.S. at 659 (Harlan, J., dissenting). He reaffirmed his commitment to these principles when he joined four other members of this Court to hold in *Mitchell* that Congress lacked the power to determine that the voting age in state elections ought to be 18 rather than 21. *See Mitchell*, 400 U.S. at 204-07 (Harlan, J., concurring in part and dissenting in part); *id.* at 296 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part); *id.* at 124-30 (Black, J.).

These essential truths were echoed by then-Justice Rehnquist in dissent in *City of Rome* when he stated that Congress's attempt to override the Supreme Court's interpretation of the Constitution under the Fourteenth Amendment "requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned." *City of Rome*, 446 U.S. at 221 (Rehnquist, J., dissenting). *See also id.* at 207, 210-13, 220-221.

Although the Court did not reach the Section 5 issue in *EEOC v. Wyoming*, 460 U.S. 226 (1983), four members of this Court – Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor – went to great lengths to reject the notion that Congress may "define rights wholly independently of [this Court's] case law . . . . " *Wyoming*, 460 U.S. at 262 (Burger, C.J., dissenting). To the contrary, "[a]llowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government." *Id.*

The Religious Freedom Restoration Act makes real what Justice Harlan only imagined when he dissented in *Morgan*:

> To deny the effectiveness of [the Voting Rights Act] is not of course to disparage Congress' exertion of authority in the field of civil rights; it is simply to recognize that the Legislative Branch like the other branches of federal authority is subject to the governmental boundaries set by the Constitution. To hold, on this record, that [the Act] overrides the New York [law] seems to me tantamount to allowing the Fourteenth Amendment to swallow the State's constitutionally ordained primary authority in this field. For if Congress by what, as here, amounts to mere ipse dixit can set the otherwise permissible requirement partially at naught I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.

Morgan, 384 U.S. at 671. With RFRA, Congress has fulfilled Justice Harlan's hoped-against prophecy to the nth degree. It is *ipse dixit* that blankets *every* field of state competence. The passage of RFRA invites this Court to set to rest, once and for all, the troublesome and constitutionally misguided notion that Congress has plenary power to interpret the Constitution at odds with this Court's interpretation and to force that interpretation on the courts.[11]

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[11] Even if this Court were inclined to read the *Morgan* decision as providing a substantive power to Congress, the *Morgan* decision and the other Voting Rights Act cases speak only to Congress's power vis-a-vis the Equal Protection Clause. They say nothing of congressional power to "ratchet" rights

Finally, even if this Court were to read *Morgan* as relying on a substantive power theory, the purported alteration of the constitutional calculus in that case, and in *City of Rome*, is mere tinkering compared with the broad-brush attack on the Court's constitutional doctrine in RFRA. By upholding RFRA on a substantive power theory, the Court would be vastly expanding the power of Congress even beyond that arguably contemplated in *Morgan* and *City of Rome*.

In sum, the Religious Freedom Restoration Act is not plainly adapted to constitutional ends and therefore fails the second prong of the *M'Culloch* test. RFRA was not enacted pursuant to a legitimate exercise of Congress's remedial power, and the substantive power theory deserves to be definitively interred by this Court at this time.

3. The Religious Freedom Restoration Act Is Prohibited by and Inconsistent with the Letter and Spirit of the Federalism Constraints Inherent in Section 5

The *M'Culloch* test finally requires congressional action "which [is] not prohibited, but consist[ent] with

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incorporated into the Fourteenth Amendment from the Bill of Rights. The original purpose of the Fourteenth Amendment was to empower Congress and the courts to eliminate state-sponsored racial discrimination. The Bill of Rights, by contrast, was designed to limit Congress itself, making the argument for expansive congressional authority over such rights suspect. *See Hutto v. Finney*, 437 U.S. 678, 710 (1978) (Rehnquist, J., dissenting); *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357, 361-64 (1994); Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539, 1582, 1595 (1995).

the letter and spirit of the constitution . . . . " *M'Culloch*, 17 U.S. at 421. Because the Act violates the separation of powers, *see supra* sec. I, federalism principles inherent in Section 5, *see infra*, and the Establishment Clause, *see infra* sec. III, it fails the final *M'Culloch* prong.

The Religious Freedom Restoration Act is a bold and unprecedented example of federal social policy engineering that commandeers the states to follow the federal government's decision to accommodate religion more than the Constitution requires. RFRA intrudes on the sovereign power of the states. *See New York*, 505 U.S. at 155-57. Congress is a body of enumerated powers, and it must respect state integrity in that exercise. *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1127, 1132 (1996); *Lopez*, 115 S. Ct. at 1626; *New York*, 505 U.S. at 156-57; *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991). As this Court stated in *New York*, " 'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.' " *New York*, 505 U.S. at 162 (quoting *Texas v. White*, 7 Wall. 700, 725 (1869)).

Congress may not ignore principles of federalism when it exercises its Section 5 powers. Rather, federalism principles provide innate limitations on the exercise of such power. As this Court declared in *New York*, 505 U.S. at 159, per Justice O'Connor:

> [J]ust as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or of discerning the core of sovereignty retained by the States under

> the Tenth Amendment. Either way, we must determine whether [the Act] . . . oversteps the boundary between federal and state authority.

One year earlier, this Court stated in *Gregory* that "the Fourteenth Amendment does not override all principles of federalism." *Gregory*, 501 U.S. at 469. The history of the Fourteenth Amendment makes it abundantly clear that "its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions." Alexander Bickel, *The Voting Rights Act Cases*, 1966 Sup. Ct. Rev. 79, 97.

This case, which involves quintessentially local prerogatives over land use, illustrates vividly the incursion RFRA makes on federalism concerns. Laws governing land use, and in particular historical preservation, are of intense local concern. "Respect for local landmark law is founded on principles of federalism." Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 Duke L.J. 1598, 1624 (1992). Thus, the enforcement of historic preservation law has been a matter left almost entirely to state and local governments, with supporting legislation from the federal government. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). *See generally*, Jane Papademetriou Kourtis, Comment, *The Constructive Trust: Equity's Answer to the Need for a Strong Deterrent to the Destruction of Historic Landmarks*, 16 B.C. Envtl. Aff. L. Rev. 793, 798-804 (1989).

History in and of itself is a commodity of compelling importance to a community. It educates, it comforts, and it solidifies a community's shared sense of itself. Francis Bacon said truly that "[h]istories make men wise." The Essays Or, Counsels, Civil and Moral of Francis Bacon, *Of Studies* 14 (1883). This Court has recognized the educative

value of history, stating that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

The Court's "cases are quite clear that there are real limits to federal power." *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring). *See also Gregory v. Ashcroft*, 501 U.S. 452 (1991). Those limits are transgressed by RFRA. Tests of compelling interest and least restrictive means dramatically skew the balance of power between local governments and churches on land use issues, including historical preservation, to the detriment of this traditional area of local autonomy. *See* Cert. Pet. at 6-7. In the end, RFRA tips "the scales too far" in favor of the federal government and in derogation of the states. *See Lopez*, 115 S. Ct. at 1639 (Kennedy, J., concurring); *Gregory*, 501 U.S. at 467-70 (holding that absent a plain statement, congressional legislation under Section 5 will not be interpreted to reach certain state political functions); *id.* at 469; *Pennhurst State School v. Halderman*, 451 U.S. 1, 16 (1981) ("Because [legislation under Section 5] imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."); *Wyoming*, 460 U.S. at 259 (Burger, C.J., dissenting) ("The Tenth Amendment was not, after all, repealed when the Fourteenth Amendment was ratified: it was merely limited.").

Congress has done in RFRA what – in our constitutional scheme – only the states may do themselves. Without question, the states voluntarily could protect religious liberty more robustly than the Federal Constitution through their own constitutions or through legislative action. *See* William J. Brennan, Jr., *State Constitutions and*

the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977); Angella C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. Rev. 275; *Wisconsin v. Miller*, 549 N.W.2d 235, 239-41 (Wis. 1996); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 725 (N.J. 1975). But *Congress* may not curtail state and local government lawmaking by forcing the states to observe a higher standard of religious liberty than the Court has deemed the Constitution requires. *New York*, 505, U.S. at 161-65; *Wyoming*, 460 U.S. at 259-63 (Burger, C.J., dissenting).

The Religious Freedom Restoration Act violates the principles of federalism reflected in the Tenth Amendment and operating as an inherent constitutional limitation on the exercise of Section 5 authority against the states.

III. THE RELIGIOUS FREEDOM RESTORATION ACT VIOLATES THE ESTABLISHMENT CLAUSE

The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. The purpose of the Establishment Clause, which is specifically addressed to Congress, is to prevent the union of Congress with organized religions. Such a union is the definition of tyranny. "For fourteen hundred years, tyranny presented a united front, thereby forcing those who would declare their independence to fight a revolution to resist all tyranny, whether of church or of state, for in the final analysis all tyranny was one." Edwin S. Gaustad, *A Religious History of America* 115 (1990). In James Madison's words, "The connection of Church and State was fatal to

the liberty of both." Adrienne Koch, Madison's "Advice to My Country" 27 (1966).

This Court announced its test to be applied in Establishment Clause cases in *Lemon v. Kurtzman*: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster 'an excessive government entanglement with religion.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 674 (1970)). This test is not satisfied by RFRA. *See* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247, 285-302 (1994).

There is no secular purpose in RFRA. The plain purpose is to provide statutory protection for all substantial burdens on religion, whether constitutionally protected or not. Unlike the type of narrowly tailored accommodation of religion contemplated by the Court in *Smith*, 494 U.S. 872 (1990), and occasionally permitted under the First Amendment, RFRA establishes an across-the-board scheme that deliberately singles out religious practices, en masse, as a congressionally favored class of activity. Congress has proffered no secular rationale – just as it has offered no factual findings – as to why such across-the-board special treatment is necessary to correct specific constitutional wrongs.

There is certainly no neutral effect. Churches have now become privileged members of every community, federal, state, or local, on every issue. The sheer breadth and substantive strength of RFRA necessarily "advance" religion, both in absolute terms and in relation to functionally comparable nonreligious forms of belief and

practice. The entire purpose of the statute, after all, is to establish a new balance – a new equilibrium – between religion and government, entirely different from the baseline of neutrality contemplated by the Court in *Smith*.

The Act miserably fails the entanglement prong by forcing every government to become expert on every religion. There is now necessary entanglement every time a community seeks to enact a law, for it must investigate whether the law will be the means of accomplishing its goal that is the least restrictive of every religion's requirements. That cannot be done without extensive investigation into the theological requirements of every relevant religion. City Councils are encouraged now to have on file detailed descriptions of every religion present and likely to be present in their communities so that they can know whether each law is narrowly tailored for every religion. Unlike the procedure envisioned by this Court in *Smith* where a city must act neutrally and in a generally applicable way and then may consider specific requests for accommodation that are raised after passage, *Smith*, 494 U.S. at 890, RFRA places cities in the position of considering every potential religious objection to every ordinance, from the perspective of each religious believer. The Religious Freedom Restoration Act both entangles and strangles local lawmaking capacity.

In *Lee v. Weisman*, 505 U.S. 577, 587 (1992), this Court held that government may not endorse the message of a particular religion. RFRA endorses a global message: the government likes religion. This message violates the fundamental constitutional requirement of neutrality on issues of conscience. *See Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 114 S. Ct. 2481, 2487 (1994); *Lee v. Weisman*, 505 U.S. 577 610-11 (1992) (Souter, J., concurring); Christopher L. Eisgruber & Lawrence G. Sager, *Why*

the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 444 (1994). Congress may not favor religion over nonreligion or religion over philosophy. As this Court stated in *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), laws may not " 'invade the sphere of intellect and spirit which . . . [is] reserve[d] from all official control.' " (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). *See also Lawson v. Singletary*, 85 F.3d 502, 506 n.2 (11th Cir. 1996). In sum, by entangling religion and government and by privileging religion, RFRA violates the Establishment Clause.

CONCLUSION

The Religious Freedom Restoration Act is different from any other act Congress has ever passed. Never before has Congress attempted to define for itself the core meaning of a clause of the Constitution and then to force that interpretation on the courts in every case raising the constitutional issue.

This Act is unconstitutional because it goes too far. With RFRA, Congress has wrested from this Court its core judicial function of finally interpreting the meaning of the Constitution, has trespassed against the states by requiring them to accommodate religious conduct more than the Constitution requires, and has forced all governments to become entangled in the theological tenets of every religion. Whatever the merits of Congress's objection to the *Smith* decision, it cannot "fix" religious liberty in flagrant disregard of settled principles of separation of powers, federalism, and church-state relations. Although the Court owes Congress deference as a coordinate

branch, the obvious constitutional evils of this statute dictate that it be struck down.

This Court should declare the Religious Freedom Restoration Act unconstitutional, reverse the judgment below, and remand the case to the district court for further proceedings consistent with this Court's decision.

Respectfully submitted,

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